SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1588

SEARS, ROEBUCK AND CO.,

AND

TERMINAL FREIGHT COOPERATIVE ASSOCIATION AND TERMINAL FREIGHT HANDLING CO.,

Petitioners,

vs.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

AND

MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL NO. 610, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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OCTOBER TERM, 1970.

No. .....

SEARS, ROEBUCK AND CO.,

AND

TERMINAL FREIGHT COOPERATIVE ASSOCIATION AND TERMINAL FREIGHT HANDLING CO.,

Petitioners,

vs.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

AND

MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL NO. 610, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioners, Sears, Roebuck and Co., Terminal Freight Cooperative Association and Terminal Freight Handling Co., charging parties before the National Labor Relations Board, seek a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit, issued in this case on March 12, 1971. That decision, dismissing petitioners' appeal from the District Court for the

Eastern District of Missouri's refusal to grant the charging parties either the right to appear and participate as full party-litigants in that court, in a proceeding brought under Section 10(l) of the National Labor Relations Act (29 U. S. C. Section 160(l)) or the right to intervene therein, was premised (i) on the lack of legislative support for according charging parties full party status and (ii) on the ground that petitioners lacked standing before the District Court in proceedings under Section 10(l).

OPINIONS BELOW.

The opinion of the Court of Appeals dismissing petitioners' appeal (App. 43), is reported at ..... F. 2d ....., 76 LRRM 2780.

The unreported Order and Decision of the District Court, from which Appeal was taken, issued on July 8, 1970 (App. 33).

JURISDICTION.

The opinion and judgment of the Court of Appeals dismissing petitioners' appeal were filed and entered on March 12, 1971.

The jurisdiction of this Court to review the Court of Appeals' dismissal of petitioners' appeal is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

(1) Whether charging parties before the National Labor Relations Board, whose charges give rise to the mandatory filing of the Regional Director's petition for injunctive relief under Section 10(l) of the National Labor Relations Act, possess the status of "parties" in the ensuing district court proceedings initiated by the Regional Director pursuant to their charges and on their behalf?

(2) Whether such charging parties are intervenors of right in the district court proceedings brought pursuant to Section 10(l) of the Act and which result from the filing of their charges with the Board.

STATUTE INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended, Section 61 Stat. 136, 73 Stat. 519, 29 U. S. C. Section 151 *et seq.*, are set forth at App. 70,

STATEMENT OF THE CASE.

This case originated from charges filed with the Board by petitioners herein, alleging that Respondent union had violated their rights by subjecting them to unlawful secondary boycott activity proscribed by Section 8(b)(4)(i)(ii)(B) of the Act, 29 U. S. C. Section 158(b)(4)(i)(ii)(B).

The union commenced its picketing of Sears on June 9, 1970, and of Terminal[1] on June 10, resulting in the aforementioned charges filed by Sears on June 10, and by Terminal, on June 12, 1970. Following a preliminary investigation of the merits of these charges, as is required by Section 10(l) of the Act, Respondent Joseph Solien, Regional Director of the Board, on June 16, 1970, concluded that there existed reasonable cause to believe that Respondent union was engaging in unfair labor practices, as charged, and that complaints of the Board should issue.

Although the terms of Section 10(l) explicitly provide that, upon making the described findings, the Regional Director "shall" petition a district court for injunctive relief, the Director ignored this mandatory direction and refused to seek such relief pending the conclusion of his unilateral settlement negotiations with Respondent union.

1. Petitioner Terminal Freight Cooperative Association is a non-profit shippers' association consisting of forty-five independent companies which receives less-than-carload and less-than-truckload shipments, consolidates such shipments into carload lots in order to secure the advantages of lower costs through large volume shipment, and reships such goods to members' plants at locations throughout the United States. Petitioner Terminal Freight Handling Company is a non-profit Delaware corporation engaged in the handling, consolidation and trans-shipment of freight as manager of the Association at more than forty terminals throughout the United States. For ease of reference these petitioners jointly will be referred to as "Terminal" herein.

Since the petitioners continued to be subjected to Respondent union's picketing, and since the Director persisted in his refusal to seek injunctive relief on their behalf, contrary to the express dictates of Section 10(l), petitioners Sears and Terminal, on June 18, and June 19, 1970, respectively, filed a Complaint for Mandatory Injunction in the district court seeking to compel the Director to honor his statutory duty. This constituted only the first of a series of legal actions which petitioners, as aggrieved charging parties before the Board, were forced to institute as a result of this unlawful picketing, in order both to perfect and to protect their statutorily guaranteed rights. The instant petition constitutes another in that series of actions.

Shortly after the petitioners filed their Complaint for Mandatory Injunction, on June 29, 1970, after a lapse of almost two weeks from his initial determination of the existence of reasonable cause to believe the proscribed violations had occurred, the Director filed his "Petition for Injunctive Relief Under Section 10(l)" (App. 1), followed, on July 2, 1970, by the issuance of his "Order Consolidating Cases, Complaint and Notice of Hearing" (App. 23).[2]

Upon the filing of the Director's injunction petition, these petitioners sought to clarify their status in the resulting district court proceedings. Accordingly, on June 30, 1970, Sears' counsel filed an appearance denoting Sears as a

2. As a result of the filing of the Director's petition, Sears withdrew its Complaint for Injunction. Terminal, however, moved for a partial dismissal of its Complaint insofar as it sought to compel the Director to file for that petition, but amended its Complaint to seek a declaratory judgment of the propriety both of the Director's initial refusal to proceed and of the still-existing internal agency rule which dictated or permitted his refusal. This case is currently pending in the United States Court of Appeals for the Eighth Circuit on appeal from the United States District Court for the Eastern District of Missouri (No. 71-1042).

"party" (App. 16) and, on July 1, 1970, Terminal's counsel filed a "Motion to Appeal and Participate as Full Parties Litigant" (App. 20).

Throughout this period, the Director had carried on unilateral negotiations with the union, resulting in a "Stipulation" which the Director's agents circulated to petitioners for their approval. The Director and the union intended this Stipulation to serve in lieu of the injunctive relief for which the Director had earlier petitioned. To the end of achieving such an informal agreed settlement in lieu of the injunction which Section 10(l) commanded the Director to seek, the Director failed to seek an order to show cause which would have resulted in a hearing on the petition which he had filed.

The petitioners—believing (i) that the remedial provisions of the Stipulation were inadequate; (ii) that they were entitled to participate fully, as parties, in the adjudication of their rights, including the determination of the effectiveness of any remedy and the right to present evidence to the court in the event of the Stipulation's breach, —rather than to be merely the unwilling recipients of an informal, inadequate, privately negotiated, non-self-enforcing Stipulation; and (iii) that the direction in Section 10(l) that the Director "shall" seek injunctive relief meant more than that the Director, having filed a petition under legal duress, may thereafter ignore his petition as if it has never been filed at all—filed specific and detailed objections to the proposed stipulation.[3]

On July 8, 1970, the district court disapproved the proffered Stipulation but held that the petitioners were not parties to the Section 10(l) proceedings and would not

3. On July 7, 1970, Sears formally filed five written Objections and Terminal filed a "Motion to Interdict Entry of and Objections to Proposed Stipulation", by way of documenting their opposition to the terms of the Stipulation which was negotiated and drafted without their participation.

be allowed to intervene, although they were permitted certain lesser rights, including, the right to be informed of all actions taken in the case, to be present by counsel at all hearings, to keep the court advised of pertinent developments and to receive copies of all documents filed. The court also set the matter for hearing, on its own motion, for July 15, 1970.

However, on July 9, 1970, representatives of the Director and the union proffered an amended Stipulation to the district court judge in his chambers (App. 35). The judge approved that Stipulation without the presence of the petitioners, without any advance notice to them that such a meeting was to be held, without affording them an opportunity to participate in the drafting of the document, without curing the defects previously protested and without affording them an opportunity to state any further objections to it. Petitioners learned of the meeting and the court's approval of the amended Stipulation only after those events had transpired. Moreover, the court's approval of that Stipulation had the effect of cancelling the scheduled hearing of July 15, preventing petitioners from filing Interrogatories which it had prepared for that hearing to be served upon the union; and from submitting evidence to the court, either in support of the Director's still pending petition for injunctive relief or for other relief which they deemed necessary to protect their vital and legitimate interests. Finally, the court's action violated its own order of July 8, which guaranteed to petitioners the right to notice of all proceedings in the case and the right to participate therein, and violated petitioners' right, expressed in Section 10(l), to a hearing at which it could "appear by counsel and present any relevant testimony" in connection therewith.[4]

4. The court below, while noting the contents of the district court's order, failed to state that the district court had not adhered to its order by accepting the proffered stipulation without notice to or presence of the charging parties.

The district court's decision denying to charging parties the right to participate as full parties-litigant or, alternatively, to intervene in the district court proceedings was appealed (App. 33).

On March 12, 1971, the court below affirmed the decision of the district court[5] (App. 43).

Petitioners seek herein to review that adverse decision.[6]

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5. During the pendency of the proceedings below, these petitioners filed with this Court a Petition for Writ of Certiorari Before Judgment to the United States Court of Appeals for the Eighth Circuit. The filing of said petition was predicated on the consideration that a similar substantive issue was then pending before this Court in another case, *The Los Angeles Herald Examiner, et al.* v. *Kennedy*, 91 S. Ct. 12 (1970), and a desire on the part of petitioners to expedite the Court's consideration of the question in view of the problem posed by the short-term nature of the relief afforded by Section 10(l). However, the predicate for petitioners' position was removed when, on October 12, 1970, this Court rendered a decision in the *Kennedy* case without reaching the merits of the common issue. Thereafter, on January 11, 1971, this Court denied petitioners' petition for a writ of certiorari before judgment.

6. Having failed to seek the statutorily required interim injunction relief provided in Section 10(l), the Board then sought to dispose of the underlying case by means of a "Settlement Stipulation" purporting to remedy the charged unfair labor practices. A document so entitled was submitted to the charging parties on about July 24, 1970, bearing the signatures of agents of both the union and the Director. The charging parties opposed such a disposition of their charges on the grounds that they lacked adequate information to judge whether all the substantive violations had been remedied, that they had not been afforded any opportunity to participate in the negotiation and drafting of this proposed settlement, and that the document lacked any findings of fact such as are required under Section 10(c) of the Act and without which it would be impossible to determine whether any resumption of the Union's picketing would violate the presumed proscriptions of the settlement.

In order to prevent the Director's approval of the settlement over the charging parties' objections, on July 17, 1970, the charging parties filed a complaint in the district court alleging that the Director had violated their rights under the Act and the Board's Rules and Regulations by excluding them from settlement discussions and depriving them of essential facts in connection with settlement deliberations in the underlying agency proceedings in

In sum, the history of this case reveals a series of actions taken by the Board's agents and the inferior courts whose effect has been to deprive the charging parties of rights guaranteed them in Section 10(l) and of the benefits which Congress intended that Section to afford. First, the Director declined to petition for injunctive relief despite the mandatory duty imposed upon him to do so in aid of unlawfully picketed charging parties; second, the charging parties were neither recognized as "parties" nor permitted to intervene nor meaningfully permitted to participate in the district court consideration of the Director's tardily filed injunction petition; and third, the Director refused to permit the charging parties to participate in the discussions and negotiations leading to the attempted and inadequate settlement of their meritorious charges filed with the Board.[7]

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which they are expressly made "parties", and sought to enjoin the Director from approving any settlement or engaging further in settlement discussions without the informed participation of the charging parties.

On July 30, 1970 the district court sustained the Director's motion to dismiss the cause for lack of jurisdiction. The charging parties thereafter filed an appeal of the district court's decision.

7. The Board has agreed to stay its appellate consideration of the Settlement Stipulation effected between the Regional Director and the union in the underlying administrative proceedings until the Eighth Circuit Court of Appeals renders its decision on the charging parties' appeal from the Regional Director's refusal to permit participation by the charging parties in the negotiation and, consideration of the terms of the Settlement Stipulation (Nos. 20462, 20472) (App. 59, 66, 68).

REASONS FOR GRANTING THE WRIT.

Introductory.

The ramifications of a determination of charging parties' judicial rights under Section 10(l) of the Act are important, manifold and undecided by this Court.

In *United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, Local 283* v. *Scofield et al.; United Automobile, Aerospace and Agricultural Implement Workers et al.* v. *Fafnir Bearing Company et al.*, 382 U. S. 205, this Court declared the *right*, after a final Board order, of successful charging parties to intervene and participate as full "parties" in the appellate consideration of their cases notwithstanding the Board's participation on their behalf. Section 10(f) of the Act confers an equivalent right upon unsuccessful charging parties.

The question posed under Section 10(l) is whether any such rights exist on behalf of charging parties when the judicial consideration of their charges occurs prior to a final Board order. It is submitted that the rationale of *Scofield* and *Fafnir* compels the extension of this Court's recognition of charging parties' vested rights in the judicial litigation of their charges to all stages of that process.

The problem has arisen in a variety of contexts in various United States Courts of Appeals. The question in *Retail Clerks Union, Local 137* v. *Food Employers Council, Inc.*, 351 F. 2d 525 (CA 9, 1965), concerned the extent to which charging parties could perform an independent role in the District Court in support of the Board's petition for an injunction after the Board changed its mind about pur-

suing the relief sought in its own petition. *Houston Insulation Contractors Association* v. *N. L. R. B.*, 339 F. 2d 868 (CA 5, 1964), involved a charging party's attempt to secure a stay of a Board order in the Court of Appeals the effect of which would be to continue in force an injunction granted under Section 10(l) which would otherwise have expired.

In *Solien* v. *International Printing Pressmen, et al.*, ... F. 2d ....., 76 LRRM 1094 (CA 7, 1970), the various orders of the Seventh Circuit granting the charging party the right to intervene in proceedings arising under Section [illegible] of the Act, constitute an application by that Court of the principles approved by the Supreme Court in *Arnold Tours* v. *Camp*, 91 S. Ct. 158 (1970). In *Solein*, the charging party moved to intervene in the Seventh Circuit on August 21, 1970. Over the Board's objections, the Court granted the motion. Thereafter, on persuasion of the Board, and in order to avoid further litigation of this issue, the charging party voluntarily agreed to accept the lesser status of *amicus curiae*, entered into a Stipulation with the Board so providing, and upon the Board's motion, the Court vacated its prior motion granting intervention. However, on November 27, 1970, as a result of altered circumstances in the case, the charging party again determined that it required the full protection of "party" status and so moved the Court. The Court, fully aware of the fact and nature of the Board's opposition to granting such status to charging parties in proceedings arising under Section 10(l), nonetheless, granted charging party's motion for full "party" status. Subsequently, the Board issued a final decision dispositive of the merits of the case, and upon its motion, the Court vacated as moot its prior order.

In addition to the above, the instant petition marks the fifth occasion during the last two and one-half years in

which this Court has been requested to determine the status and the rights which charging parties enjoy in proceedings authorized by or resulting from Section 10(l) of the National Labor Relations Board. In *San Francisco-Oakland Newspaper Guild et al.* v. *Kennedy,* 393 U. S. 926, this Court declined to decide whether charging parties properly may be denied an opportunity to intervene in an appeal of a favorable decision rendered by a district court under Section 10(l); in *Sears, Roebuck and Co.* v. *Local 419, Carpet Layers,* 397 U. S. 655, this Court declined to determine whether charging parties properly may be denied a right to seek appellate review of an adverse district court decision when the Board declined to seek such review; in *Terminal Freight Cooperative Association et al.* v. *Samoff,* 90 S. Ct. 2171 (1970), this Court declined to decide whether a district court properly may deny to charging parties either the right to participate as parties-litigant there, or the right to be heard on their objections to the manner in which their substantive rights and interests are adjudicated; in *The Los Angeles Herald Examiner, et al.* v. *Kennedy, supra,* this Court was confronted with the issue of whether charging parties have standing to seek a stay of a district court's dissolution of a Section 10(l) injunction, or to intervene in the Board's effort to secure such a stay. This Court granted the petition for certiorari in a per curiam decision, in which this Court also vacated the lower court's decision as being moot, with no resolution made of the merits of the issue of charging parties' status as either full parties-litigant or intervenors.[8]

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8. This Court has demonstrated its continuing interest in the question of charging parties' status as "parties" under the Act by recently granting certiorari in a case arising out of section 10(k) of the Act. *N. L. R. B.* v. *Plasterers Local Union No. 79, Operative Plasterers and Cement Mason's International Association, AFL-CIO, et al.* (No. 1183, October Term, 1970).

A decision in the instant case will decide the underlying questions presented, but not resolved in both *Sears, Roebuck and Co.* v. *Local 419, Carpet Layers, supra,* and *The Los Angeles Herald Examiner* v. *Kennedy, supra.* For, by deciding the issue of whether charging parties have the status of full party-litigants or, alternatively, intervenors in district court injunctive proceedings, subsequent to the initiation of said proceedings by the Regional Director, then the related issues of their right to seek appellate review of adverse district court proceedings (Sears) and to seek a stay of a district court dissolution of Section 10(l) injunctions (Los Angeles Herald Examiner), rights which necessarily attach to "party" status, will be conclusively determined. Moreover, the predicate for this Court's prior refusal to decide these issues—mootness—has been withdrawn in the instant case, both by the Circuit Court's decision and the Board's agreement to stay its appellate consideration of the underlying case.

Finally, the instant case presents the question as to whether charging parties may participate as "parties" in the district court disposition of cases resulting from their filing of charges with the Board, based upon injuries they suffered as a consequence of the violation of their statutory rights for which the statute, in Section 10(l), provides relief to them from a continuation or repetition of the legal wrongs which they suffered.

The foregoing summary plainly reveals that the problem of defining the rights and the status of charging parties in proceedings under Section 10(l) is both a serious and recurring one. The absence of guidance from this Court can only serve to promote expensive and time-consuming litigation as charging parties in such cases, unclear as to their rights and the level of participation to which the protection of those rights may entitle them, will continue to seek judicial clarification.

Further, apart from the merits generally of a resolution by this Court of a problem which would otherwise inevitably give rise to recurring disputes, certiorari is also sought because the decision of the Circuit Court below is inconsistent both with the demonstrable intent of Congress, decisions of other circuit courts,[9] and related decisions of this Court.

A. The Right of Charging Parties to Function as "Parties" in Proceedings Arising Under Section 10(l) Is a Product of Congressional Intent as Evidenced by the Legislative History, the Statutory Scheme, and Decided Authority of This Court.

In deciding the issue of the extent to which charging parties are afforded full party status in actions for temporary injunctive relief under Section 10(l) of the Act, after their initiation by the Regional Director, the court below acknowledged the existence of "cogent reasons" why charging parties *should be* accorded such status. Nevertheless, in upholding the district court's decision, the court predicated its decision principally on a lack of legislative support for petitioners' position. The court did not deny the fact (i) that congressional silence, as has been found by this Court, is not necessarily controlling in determining the existence of asserted rights[10] or (ii) that the existence of the rights to full party status can reasonably be derived from an analysis of the scheme of the statute. Rather, the only support for its conclusion that the legislative history

9. *Retail Clerks Union, Local 137* v. *Food Employers Council, Inc., supra; Houston Insulation Contractors Association* v. *N. L. R. B., supra; McLeod* v. *General Electric Co.*, 366 F. 2d 847 (C. A. 2, 1969).

10. *Scripps-Howard Radio, Inc.* v. *F. C. C.*, 316 U. S. 4, 11; *U. A. W.* v. *Scofield (Fafnir Bearing Co.), supra; Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150 (1970); *Barlow* v. *Collins*, 397 U. S. 159 (1970).

did not support the existence of such status was legislative silence. Upon reaching this conclusion, the court then supported it by reference to a Tenth Circuit Court of Appeals decision (*Sears, Roebuck & Company* v. *Carpet Layers Local,* 410 F. 2d 1148 (1969)), wherein the issue decided—the right of a charging party to seek appellate review of an adverse district court decision when the Regional Director declines to seek such review—was much narrower than that herein. Moreover, this Court granted certiorari in that case and vacated the decision of the Court of Appeals. Therefore, that decision can not be utilized as a rationale, as it was by the court below, for concluding that charging parties lack "party status" under Section 10(l). While it is true that Section 10(l) itself is silent with respect to the "status" of charging parties thereunder, it is submitted that an analysis of the legislative history, statutory scheme and relevant case law compels a conclusion that charging parties possess the status of "full parties" in all proceedings arising under Section 10(l) of the Act after such proceedings are initiated by the Regional Director.

1. Analysis Of The Legislative History Establishes Congressional Intent That Charging Parties Be Granted "Party" Status in Proceedings Under Section 10(l).

The debates in both the 79th and 80th Congress preceding the adoption of the Taft-Hartley amendments to the labor laws dealt extensively with the conflict between (i) the right of private parties to a speedy and effective remedy against the devastating effects of secondary boycotts and jurisdictional disputes, (ii) the need to retain the prohibitions against permitting courts to grant injunctions in labor disputes, as contained in the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U. S. C. Sections 101-15, and (iii) the need to preserve the scheme of the old Wagner Act in which procedures of the National Labor Relations Board were available for primary settlement of labor disputes.

The 79th Congress evidenced a strong intention that private parties be granted the most direct protections from the crippling effects of unlawful secondary activity when both houses passed the Case Bill,[11] which permitted both the Government *as well as private parties,* directly and independently, to seek temporary injunctive relief in secondary boycott cases. However, President Truman vetoed the Case Bill, which veto survived the effort of a majority of the House to override it.[12]

The veto of the Case Bill was motivated by a concern that the emergency strike provisions proposed therein were inadequate and also the fear that to permit private parties independent and direct access to injunctive relief would essentially represent a repeal of the Norris-LaGuardia prohibition on injunctions in labor disputes.[13]

The conflict facing Congress was clear. On the one hand, it was recognized that the speediest and most efficient manner for remedying an unlawful strike would be to permit neutral employers victimized by secondary boycotts to seek an injunction without the delay incident to awaiting the results of a hearing on the merits of the dispute before the Labor Board. On the other hand, however, it was necessary to avoid another Presidential veto and still provide means by which neutral employers could obtain temporary injunctive relief. The 79th Congress ended without resolving this practical dilemma.

When the 80th Congress was convened, Senate Bill 55 was introduced and contained similar provisions to the

11. 92nd Congressional Record 5946 where the House approved the Senate revisions contained at 92 Cong. Rec. 5929, which provided for temporary injunctive relief sought directly by private parties in secondary boycott situations.

12. 92nd Cong. Rec. 6674 and 6678. Of 431 Congressmen, 255 voted to override the veto, 135 voted to sustain it and 41 did not vote.

13. Messages to Congress; re Case Bill Veto p. 1686, 1962.

Case Bill with respect to the right of private parties to seek injunctive relief. In the 80th Congress, the House had also passed a bill which permitted private parties directly and independently to seek temporary injunctive relief. Hearings were held on S. 55 and related bills. It was apparent at that time that compromise was necessary in order to avoid another veto.[14]

The statute, as ultimately adopted, predictably represented a compromise. In order to provide a meaningful remedy for employers faced with unlawful picketing, injunctive relief was provided. However, in order to avoid a situation in which employers could forum-shop or achieve an independent development of the law through *their* selection of theories of violation and relief, *i.e.*, the abuses which gave rise to Norris-LaGuardia, the right to *initiate* injunction suits was limited to the Board. Thus, Congress sought to afford employers an injunctive remedy while preserving the National Labor Relations Board's principal role in the labor field by confining to the Board's judgment both the identification of the cases in which injunctive petitions should be filed, and, necessarily, the nature of the violations to be alleged and the limits of the relief to be sought therein.

The significance of this legislative background to the issue of the extent of charging parties' rights in injunction proceedings is threefold:

(1) There existed substantial Congressional support for the proposition that charging parties before the Board who were victimized by illegal picketing should have a *right* of access to the courts in order to obtain relief and protection from such conduct.

(2) Concern over a possible emasculation of Norris-LaGuardia resulted in a compromise in which charging

14. 93 Cong. Rec. 4844 (remarks of Sen. Taft).

parties were prohibited only from *instituting* suits for injunction; no limitation on their *right* otherwise to participate in court proceedings in furtherance of such petitions, when filed by the Board, was either expressed or implied.

(3) Since Section 10(l) as ultimately enacted, represented a compromise between the interests of affording to private parties the speediest and most direct remedy against the devastating effects of illegal boycotts and strikes, and of avoiding another presidential veto and a recurrence of the abuses giving rise to the passage of Norris-LaGuardia, all rights incident to speedy and direct protection from the proscribed conduct by charging parties themselves, except the right to initiate injunctive proceedings, should be imparted into the interpretation of the Section.

It follows, therefore, that Section 10(l) should not be afforded the narrow interpretation given it by the Circuit Court below. As indicated by the legislative history, the *sole* limitation placed by Congress upon private parties' rights to participate in the district court injunction proceedings stemming from their filing of charges with the Board is their right to initiate such proceedings. Once the Board has filed a petition for such injunctive relief, a reading of the statute requires a recognition of charging parties as judicial "parties" thereafter. Such an interpretation,—apart from giving effect to the equitable truism that one whose initiative and interest gives rise to a court proceeding and whose personal and property interests are vitally effected by its outcome should have a right to fully participate in district court determinations intimately and directly affecting those interests—similarly gives effect both to the views of those legislators who sought to limit encroachment on Norris-LaGuardia by preventing private parties from freely instituting injunction proceedings on their whim, and those others who sought to guarantee pri-

vate parties the right to full access to the courts as the best means for protecting their vital interests.

Consequently, when the Board does institute an injunction action, and charging parties thereafter seek the success of the Board's petition,—whether in the district court or in appellate courts,—charging parties thereby exercise rights which the legislative history of the Act demonstrates that Congress intended them to possess and whose possession and exercise is incompatible with lesser than "party" status.

2. The Scheme of the National Labor Relations Act Evidences Congress' Intent That Charging Parties Constitute "Parties" in Proceedings Under Section 10(l).

In general, Section 10(l) constitutes a mandatory direction on the Board's agents to file a petition for injunctive relief in aid of aggrieved charging parties whenever it appears that there is reasonable cause to believe that the latter's charges are true that they have been victimized by certain illegal strikes, picketing or boycotts prohibited by Sections 8(b)(4) and 8(b)(7) of the National Labor Relations Act. Section 10(l) goes on to provide, in relevant part:

> "Upon filing of any such petition the courts shall cause notice thereof to be served upon any person, involved in the charge and such person, *including* the *charging party*, shall be given an opportunity to appear by counsel and present relevant testimony . . ." (Emphasis added.)

While Section 10(l) states nothing further regarding any participants' additional rights in the district court proceedings, and nothing whatever regarding any appellate rights, it is by now well established that the fact of Congressional silence does not, by itself, govern the question of their existence or non-existence. The United States

Supreme Court has frequently found rights to exist in the face of Congressional silence when an analysis of the statutory scheme reveals an uncodified Congressional purpose.[15]

A cogent example of the proper approach to a definition of rights in the face of legislative silence is demonstrated by the fact that nowhere, either in Section 10(l) or anywhere else in the Act, does Congress specifically authorize appellate review by respondents against whom an injunction has been issued by a district court. While it is true that the exercise of this right is customary in our judicial system, it is also true that in Section 10(f) of the Act, Congress only expressly codified its exercise as to respondents against whom final agency orders had been issued. Pursuant to the theory of the court below, therefore, Congress' failure to provide an analogue to Section 10(f) in cases involving injunction proceedings should indicate its desire that enjoined respondents lack the right of review. Similarly, pursuant to the theory of the court below that what is unstated was not intended, charging parties in cases under 10(l) lack the *right* to cross-examine witnesses, to file briefs, to respond to motions, and only possess the right, specifically given by Congress "to appear by counsel and present any relevant testimony". The anomalies created by such a restrictive interpretation are obvious. Accordingly, the view of the court below that the words of Section 10(l) must be literally construed cannot be sustained through either practice of the Board or logic.

As did an analysis of the legislative history, an analysis of Section 10(l), in conjunction with the statute of which it is a part, establishes that Congress intended charging parties to enjoy the status of "parties" under Section 10(l), possessing the rights and privileges of that status.

In fashioning the statute, Congress everywhere made the participation and interests of the charging party central to all proceedings authorized in the Act.

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15. See cases cited, footnote 10, *supra*.

a. Participation by the Charging Party.

(1) In Section 10(b), Congress made the charge by an injured party the jurisdictional prerequisite to the filing of the initial Board complaint;

(2) Under the Board's construction of the Act, it has accorded the charging party with the status of a full party litigant in all proceedings before the Board, without limitation as to the various stages of the proceedings involved;[16]

(3) The charging party is accorded the right to appeal adverse decisions of Trial Examiners to the Board, in Section 102.46(a) of the Board's Rules;

(4) The charging party is accorded the further right to seek, after issuance of the Board's order, a reopening of the hearing, rehearing, or reconsideration; Section 102.48(d) of the Board's Rules;

(5) The charging party is deemed a "person aggrieved" within the Congressional intent of Section 10(f), and thus entitled to invoke judicial review of final orders of the Board if the Board refuses any of the relief sought by the charging party. (*Albrecht* v. *N. L. R. B.*, 181 F. 2d 652 (CA 7, 1950), and cases there cited);

(6) Just as a charging party independently may seek appellate review in all cases where he was unsuccessful before the Board, similarly, he may participate as a full party in the appellate review of cases where he was successful. (*U. A. W.* v. *Scofield, supra*, which so held despite the statute's silence in conferring that right and over the Board's objections there that legislative silence indicated that Congress did not intend to grant successful charging parties the right to participate in such appellate proceedings.)

16. Section 102.8 of the Board's Rules and Regulations and Statements of Procedure, Series 8, as amended, defines those who shall be deemed a "party" before it and includes in that group ". . . any person filing a charge or petition under the Act, . . .".

Thus, as acknowledged by the Circuit Court in its decision, by filing a charge the charging party becomes a full party before the General Counsel in the investigative stage, before a Trial Examiner after Complaint has issued and with full appellate rights, before the Board on review of the Trial Examiner's decision, in the appellate courts after the Board's decision, and with the right independently to seek certiorari from the Supreme Court.

It is against this background that the Circuit Court below held that Congress' failure *specifically* to label charging parties as "parties" in district court proceedings brought by the Board establishes Congress' intent that they should not possess that status there, although they do possess it for all other purposes, whether expressly provided by Congress or not, in all other proceedings authorized in the Act.[17]

b. Recognition of the Interests of the Charging Party.

Not only does the Act accord to charging parties the status of full "parties" in all proceedings before the Board, and clothe them with all the procedural safeguards customary to that status including the right to seek review at all levels of those proceedings, but the Act also recognizes that the rights which are thus protected include the charging parties' private or parochial rights and interests. One of the principal holdings in *U. A. W.* v. *Scofield, supra*, was precisely the proposition that the Act recognizes and enforces the private rights of aggrieved parties, and not merely generalized "public rights". Thus, the right to be free of the effects of an unlawful secondary boycott, while it is a right which the Board enforces in the public interest,

17. Moreover, the language of Section 10(l), wherein Congress makes reference to respondent unions as "parties" can not be interpreted as demonstrating Congressional intent to relegate other persons to a lesser status, but is only for the purpose of making clear that unions constitute entities capable of being sued.

is also a private enforceable right of the aggrieved victim of that boycott.

One of the means by which the Act affords relief from the effects of unlawful boycott activity is the provision for injunction found in Section 10(l). Hence, to say that the Act enforces private rights means that there is a private right to the relief provided in Section 10(l). However, there would be no point to recognizing the distinction between a private and a public right if the private beneficiary were not accorded a role separate and independent from the Board in supporting and protecting it.

The nature of that role is only consistent with "party" status. This result follows from the fact that such a status is conferred upon charging parties for every other purpose and in every other respect under the Act. It follows from the inescapable conclusion that the private rights protected under Section 10(l) are as significant as any others recognized by the Act and for whose protection and enforcement party status is conferred.[18] And it follows by implication from the terms of Section 10(l) itself.

Manifestly, the enumerated rights of participation granted charging parties in Section 10(l) exceed those associated with the status of an *amicus curiae*. An *amicus* is not entitled to participate actively in the development or introduction of evidence, or to raise objections, or to make argument during the course of the litigation; he is limited instead, and only with the Court's permission, to oral argument or the filing of briefs *after* the record is made. However, the express and necessarily implied pro-

18. The fact that Congress imposed a *mandatory* duty on the Board to enjoin the unlawful strikes and boycotts which constitute the subject matter of Section 10(l) proceedings, whereas the Board was merely given the *discretionary* power, in Section 10(j) to seek injunctive relief against all other types of unfair labor practices, reveals Congress' view of the relative significance of the private rights protected by Section 10(l).

visions of Section 10(l) permit charging parties, without need of the court's permission, to be represented by counsel throughout the proceedings, to call and cross-examine witnesses, to offer contentious evidence, to introduce documentary and other relevant matter, to make and respond to oral argument and to file briefs. In exercising these rights the charging parties not only create the record which will govern their destinies in the district court, but they also narrow the issues and shape that record for appellate review. Were the statute intended to relegate charging parties to the status of *amici*, then their role would not have been expanded to permit such full and active participation as a matter of right.

Congress' intent to afford charging parties under the Act a full participatory role in district court injunctive proceedings as well as before the agency itself—a role exercised only by "parties"—is further evidenced by analogy to what Congress provided in the provisions of the Judicial Review Act, 5 U. S. C. Sections 103-42.

The latter statute, which purported to import the procedures of the National Labor Relations Act into the schemes of other Federal agencies, contains the following relevant provisions in Section 1038:

> "The agency, and any party or parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside or suspended, may appear as *parties* thereto on their own motion and as of right, and be represented by counsel in any proceedings to review such order . . ."
>
> "The Attorney General shall not dispose of or discontinue said proceeding to review over the objection of such *party or intervenors* aforesaid, but said intervenor or intervenors may prosecute, defend or continue said proceeding unaffected by the action or nonaction of the Attorney General therein." (Emphasis added.)

In short, if Congress had not intended charging parties to function as "parties" in proceedings under Section 10(l), then it would not have granted them rights under that Section such as only "parties" can exercise and which precise rights they may exercise as "parties" in pursuance of their private interest for all other purposes under the Act.

c. Congressional Intent as Revealed in a Comparison Between the Language of Sections 10(j) and 10(l) of the Act.

Sections 10(j) and 10(l) are alike in that both authorize the Board, acting through its Regional Directors, to institute petitions for injunction when the Regional Director believes that charged unions have engaged in such injurious unfair labor practices as render extraordinary injunctive relief appropriate. The sections differ only in that pursuant to Section 10(j), injunctive relief *may* be sought for any violation of that statute, whereas Section 10(l) provides that such relief *must* be sought for the violation of the specific and particularly injurious unfair labor practices enumerated therein.

Whereas Section 10(l) requires that charging parties be notified of the filing of the petition and be permitted to appear by counsel and present any relevant testimony, Section 10(j) requires only that they be notified of the filing of the petition. The difference in the nature and extent of the rights granted the respective charging parties in these sections manifests Congress' intent to confer on charging parties in 10(l) cases such rights of participation as would guarantee the fullest protection of their interests. Such a guarantee goes beyond the presence of and the representation by the Board, which was deemed adequate to protect charging parties in cases arising under 10(j) but was deemed inadequate for cases under 10(l). Rather,

the nature of the additional guarantee afforded by Congress was affirmatively to confer upon charging parties in 10(l) cases the status of "parties".[19]

Indeed, if Congress believed that the judgment and participation of the Board in injunction proceedings under Section 10(l) would suffice fully to protect the charging parties' interests, and that they should have no independent role in the participation and prosecution of the case which was not circumscribed by the Board, then there was no need for Congress explicitly to confer rights upon charging parties in 10(l) cases which were denied to those in 10(j) cases. The adoption of such a view would render meaningless the deliberate statutory distinction between the rights conferred in the two sections. It follows, therefore, that Congress intended to accord charging parties in 10(l) cases the independent status of "parties", clothed with the rights of that status, including, for example, the right to participate in the settlement of cases arising under Section 10(l), to fully participate in district court proceedings, and to seek appellate review of adverse decisions in the district court.

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19. The difference between the rights accorded to charging parties in the two sections is justifiable on two grounds. First, the nature of the conduct with which Section 10(l) deals, *i.e.*, unlawful strikes and boycotts, inherently involves the greatest potential harm to the aggrieved victims. For this reason Congress also imposed a mandatory duty on the Board to seek injunctive relief in cases arising under that Section whereas in all other cases, such as are dealt with in Section 10(j) the Board is given discretion as to whether to seek such relief.

Second, it would be inconsistent with the discretion accorded the Board in Section 10(j) to confer independent party status on charging parties in the latter cases, since they might seek to go forward in instances where the Board's discretion dictated otherwise. Clearly, when the Board is required to proceed, as in Section 10(l), no such potential conflict exists.

B. Whether or Not Charging Parties Are Conferred "Party" Status Under Section 10(l), They Have a Right to Intervene in All Proceedings Related Thereto.

1. The Right of Charging Parties to Function as "Parties" Under Section 10(l) Through Intervention Is Established by Analogy to Their Standing to Secure Appellate Review.

Respected scholars and courts have expressed the view that interests which are adequate to confer standing to seek judicial review are also adequate to confer the right to participate as parties in the proceeding from which review may be sought. Professor Davis has concluded that:

> ". . . the problem of right to intervene in administrative proceedings is closely related to and in some measure governed by the elaborate body of law concerning standing to challenge and to enforce administrative action."[20]

This view has found judicial approval, for example, in the Court of Appeals for the District of Columbia Circuit:

> "Cases concerning the question of standing [to seek review] have been used interchangeably in resolving questions of standing to intervene. Except for the adjustments necessary for assuring the manageability of administrative proceedings, the criteria for standing for review of agency action appear to assimilate the criteria for standing to intervene." (footnote citations omitted.)[21]

The criteria for determining when standing to seek review exists have recently received extended attention from this Court in *Association of Data Processing Service Or-*

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20. I Davis, Administrative Law Treatise, Section 8.11 at 564 (1958).

21. *The National Welfare Rights Organization, et al.* v. *Finch, et al.* (Nos. 23,787, 23,890, CA DC, decided June 9, 1970), slip opinion, pp. 13-14.

ganizations Inc. v. *Camp, supra,* and *Barlow* v. *Collins, supra.* The tests for determining the existence of such standing were stated by the Court as follows:

> (1) "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise" and
> (2) "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." (*Data Processing Service, supra,* 397 U. S. 150 at 152, 153.)[22]

As judicially interpreted and clarified, an injury of any kind in fact to any person or group which is the beneficiary of the statute under which the plaintiff raises his claim is sufficient to confer the right of full participation as a "party" as well as standing to seek review, unless the statute *expressly* or by necessary implication provides otherwise. The fact that Congress may not have expressly conferred standing on the group of which the complainant is a member is not necessarily controlling.[23] This principle received support from Professor Louis L. Jaffe, who, in discussing the issue of standing in the absence of express congressional direction has stated the doctrine thus:

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22. The principles of these cases were most recently restated by the Court in *Arnold Tours* v. *Camp, supra,* where the Court reiterated its approval of the "growing trend toward enlargement" of the class of persons having independent standing to seek review.

23. Standing results from the satisfaction of the two stated criteria, in reliance upon the evidence of Congress' intent which is afforded by the Administrative Procedure Act, 80 Stat. 392, 5 U. S. C. Section 701, *et seq.,* in which Congress provided, in Section 702:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

See also *Barlow* v. *Collins, supra,* 397 U. S. at 164-5; *The National Welfare Rights Organization, supra*; *U. A. W.* v. *Scofield, supra*; *Arnold Tours* v. *Camp, supra.*

> "Where a statute does not provide for review or does not specify the class of plaintiffs who may seek review, the Supreme Court has followed the lead of Mr. Justice Brandeis in the *Chicago Junction Case* (264 U. S. 258, (1924)) and in *Alexander Sprunt & Son, Inc.* v. *United States* (28 U. S. 249 (1930)). The doctrine thus developed is that a plaintiff whose interest it is one of the purposes of a statute to protect *in whatever degree* is entitled to seek review. . . "[24] (Emphasis added.)

Moreover, Professor Jaffe does not appear to subscribe to the restrictive view expressed by the Circuit Court below that the *Data Processing* case applies only to review of adverse agency action. In discussing the applicability of *Data Processing,* he concludes that standing under the *Data Processing* rationale reaches *anyone* "arguably within the zone of interest to be protected." That Congress intended that the benefits of 10(l) injunctive relief inure directly to charging parties, thus placing them within this "zone of interest", has been amply demonstrated through an examination of the legislative history, *supra.*

It is submitted, therefore, that the Circuit Court's interpretation of *Data Processing* and *Barlow;* limiting their applicability only to situations in which adverse agency action is involved is too restrictive. While the conclusions stated in the excerpts quoted above address themselves principally to status in and review of administrative proceedings, they should not be limited to such proceedings since the logic which supports those conclusions have universal applicability. The interests which are adjudicated in administrative proceedings are as important as those with which courts regularly deal; the consequences of adverse decisions are as harmful; and there is no greater guarantee that administrative agencies will decide wisely and correctly than that inferior courts will do so. Given

24. Jaffe, *Standing Again,* 84 Harv. L. Rev. 633 (1970).

these parities, it follows that the need to afford charging parties the fullest protection of their interests in cases arising under Section 10(l) in district court proceedings, after those cases are initiated by the Regional Director, is as great as the need to protect their equivalent interests before the administrative agency.

Therefore, it follows that whenever a litigant's interest in the result of a suit is sufficient to permit him to obtain appellate review of an adverse result, then than interest should also entitle him to the fullest participatory role in the conduct of the suit, whether it is an administrative or a judicial proceeding.

> "The right of judicial review cannot be taken as fully realized, however, if appellants are excluded from participating in the proceeding to be reviewed."[25]

In addition, if the petitioners herein have standing to review the merits of an adverse decision rendered in a district court proceeding under Section 10(l), then they are entitled to function in that district court proceeding and all resulting proceedings as "parties," through intervention if necessary, in order to protect their vital interests and to avoid any subsequently reviewable injury.

The application to the facts of this case of the tests defining standing to seek review reveals that the petitioners should have been permitted to intervene and participate as full party-litigants even if, in the court's view, they did not affirmatively possess the status of "parties" under Section 10(l) in the proceedings there: Section 10(l) affords relief to them from violations of their right to be free of unlawful secondary boycott activity; an adverse decision by the district court in refusing to grant relief, or in granting lesser relief than that initially sought by the Director and subsequently urged by petitioners would clearly constitute an

25. *The National Welfare Rights Organization, et al., supra,* slip opinion, p. 21.

injury to interests for whose very protection Section 10(l) was enacted.

In fact, by approving the Director's and union's profferred Stipulation in lieu of granting injunctive relief pursuant to the then pending petition, the district court did inflict such injury. The Stipulation, which was approved over the charging parties' objections, was not an adequate substitute for the statutorily-guaranteed right to injunctive relief. Whereas the granting of an injunction after a hearing requested by the charging parties would have the significant deterrent effect of subjecting a violating party to proceedings in contempt, the Stipulation had not such deterrent effect. That Stipulation constituted only an agreement not to engage in secondary boycotts which, if violated, permitted the Board, when and if it was able and disposed, to secure from the district court an ex parte restraining order. Such an order, pursuant to the express terms of Section 10(l), would expire after five days. For any further relief, a full hearing is required with notice and full participatory rights guaranteed to all parties.

Thus, the resumption of unlawful boycott activity by the union would not have subjected it—nor would such a resumption subject it now—to contempt but would only have entitled it to a full hearing whose conclusion could only have yielded precisely that injunction to which the charging parties had claimed themselves to be entitled from the outset.[26]

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26. Nor has the Stipulation, which was designed to serve in lieu of interim injunctive relief pending the Board's adjudication of the underlying dispute, succeeded in resolving any disputed contentions. The district court rejected the initial Stipulation proposed in the Section 10(l) proceeding because the Union insisted on its right to picket these petitioners; the Board's Complaint alleged all such picketing to be unlawful. The Stipulation as finally approved did not incorporate the Board's view; rather, it was silent on the question as to whether, and under what conditions, the

Apart from the delays and the absence of genuine deterrent effect inherent in this procedure, the Circuit Court's decision failed to recognize the charging parties' "party" standing under Section 10(l) and yielded further damage to their legitimate interests. Pursuant to the Stipulation actually approved by the district court only the Board was empowered to petition the court for relief should the union resume its unlawful conduct. However, had the district court acknowledged the charging parties' status as "parties", then those charging parties could have acted unilaterally to bring to the court's attention any subsequent resumption of the unlawful conduct which caused the Board to file for injunctive relief in the first instance and without the necessity for charging parties to revert anew to the procedures of the administrative agency and the resultant delays inherent in the administrative process which traditionally inhibit the Board's ability to move with equivalent dispatch. Moreover, the Stipulation approved by the court failed to set forth sufficient findings of fact giving rise to the prohibition contained therein, creating a needlessly difficult problem in determining whether a resumption of picketing would in fact violate any such prohibitions.

Thus, whereas Section 10(l) requires the mandatory seeking of injunctive relief, the Director failed to take any action, after the act of filing the petition, to obtain such relief, over the objection of petitioners who were unable to make an adequate record on their own behalf, who were neither present when the district court approved the Stipulation nor even on notice that the court was then considering such approval, and who had not even been afforded

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Union might engage in such picketing in the future. Therefore, instead of defining both parties' rights and limitations, the approved Stipulation finesses that all-important problem and invites future disputes.

the opportunity to examine the document prior to its approval by the court, all in violation of the rights granted them in Section 10(l) and as a consequence of being denied the right to participate as parties or to intervene.

Accordingly, under the tests of *Data Processing Service* and *Barlow, supra,* that standing to seek review follows from (i) an injury to a plaintiff, (ii) sustained pursuant to an alleged misapplication of a statute under which plaintiff raises his claim, petitioners herein have standing to review the decisions of the district court and circuit court.[27] And pursuant to authorities holding that the possession of that standing confers on such plaintiffs the right to participate as party-litigants in the proceedings ultimately to be reviewed,[28] petitioners should have been accorded that right in the district court below.

2. Charging Parties' Right to Intervene in Proceedings Under Section 10(l) Also Derives from This Court's Decision in UAW v. Scofield (Fafnir Bearing Co.).

The Circuit Court's decision sustaining the district court's refusal to permit petitioners, charging parties before the Board, to intervene in proceedings under Section 10(l) is in conflict with this Court's decision in *Scofield.*

27. While the question of the right of charging parties to review the merits of district court decisions rendered under Section 10(l) has not been definitely adjudicated, the existence of such a right appears to follow necessarily from this Court's decisions in *Data Processing Service* and *Barlow.* The only contrary appellate court result was expressly vacated by this Court in *Sears, Roebuck and Co.* v. *Carpet Layers Union, supra.* See also *United Steelworkers* v. *N. L. R. B.*, 376 U. S. 492; *International Union of Mine, Mill and Smelter Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U. S. 335.

28. *American Communications Association* v. *U. S.*, 298 F. 2d 648, 50-1 (CA 2, 1962); *National Welfare Rights Organization et al. supra*; Davis, Administrative Law Treatise, *supra*; In re: *Keystone Realty Holding Co.*, 117 F. 2d 1003, 1005 (CA 3, 1941); *Gleeson* v. *Carr*, 219 F. 2d 64, 67 (CA 9, 1955), cert. den. 350 U. S. 827; *Ashbacker* v. *F. C. C.*, 326 U. S. 327.

In *Scofield,* this Court argued generally for the fullest participation by charging parties in the judicial consideration of cases initiated by their charges with the Board. Although the precise question involved there related to the right of successful parties before the Board to intervene in review proceedings of final Board orders in the appellate courts, the rationale of the decision applies as well to intervention rights in the district court. The same "private interests" are at stake in both; the same possibility of injury to those vital interests exists in both. While in both tribunals, the charging parties' interests are represented by the Board's agents, nonetheless, just as the Board's presence and representation does not exclude the exercise by charging parties of an independent role in appellate deliberations, so also the same representation should have no greater effect in the district court when comparable rights and potential injuries are involved. Moreover, the advantages which, according to *Scofield,* accrue to the process of judicial deliberation through permitting intervention in enforcement proceedings in the appellate courts, apply as well to Section 10(l); these consist of evolving the fullest record for review, simplifying and clarifying the issues, and, in general, placing the matter before the court in the best posture for securing a thoughtful and encompassing decision.[29]

Contrary to the Circuit Court, petitioners herein submit that analysis of this Court's *Scofield* decision leads to the

29. The applicability of *Scofield* to district court proceedings finds support from Professor Jaffe:

> "If the statute allows a party to appeal from an adverse Board decision why not from an adverse judicial ruling? I am not a friend to loose intervention practices, to practices which threaten to encumber administrative hearings and judicial review. But the interest of a charging party—as the statute itself makes clear—is central to the whole proceeding. To allow intervention merely accords to that interest a customary protection." Jaffe, *Judicial Control of Administrative Action,* p. 545 (1965).

conclusion that *Scofield* applies, as well, to proceedings under Section 10(l). This conclusion derives from the fact that in the course of explication of the rights which charging parties may exercise in view of the level of their vital interests, this Court approvingly cited *Retail Clerks Union, Local 137* v. *Food Employers Council, Inc., supra* (discussed in greater detail, *infra*). The *Retail Clerk's* case arose under Section 10(l) and permitted charging parties an expanded exercise of rights for the same basic reasons as did the Supreme Court in *Scofield*,—i.e., a recognition of the existence of private rights requiring an independent private role in their protection.

In brief, this Court's decision in *Scofield*, that the Board does not have *exclusive* authority to represent and protect the particular and private interests of the charging parties, applies as a matter of logic to all proceedings in all tribunals where those interests are involved and require informed and interested protection.

Finally, apart from the fact that the Circuit Court's restrictive interpretation of *Scofield* violates the logic of that decision, its' conclusion with respect to the applicability of Rule 24(a)(2) of the Federal Rules of Civil Procedure, is also inconsistent with this Court's *Scofield* decision, wherein this Court considered this rule to be relevant by analogy.

This Rule provides:

> "*Intervention of Right.* Upon timely application, anyone shall be permitted to intervene in an action . . . When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

The Circuit Court held that the existence of the Board's expertise and experience insured that the interests of the

Charging Parties would be "adequately represented". However, this Court has demonstrated that this is not necessarily true for, in rejecting the Board's claim in *Scofield* that it should function as the charging parties' sole representative, this Court established the proposition that the charging parties' private interests which the Act recognizes and protects are not always "adequately represented" by the Board. It follows, therefore, that Rule 24(a)(2), which this Court has applied by analogy to appellate proceedings, should similarly be applied in connection with charging parties' efforts to intervene in proceedings under Section 10(l).

3. The Authorities.

The decision of the Circuit Court in the instant case adds to the existing disharmony of other circuit courts which have dealt with the question of the status of charging parties under Section 10(l).

Whereas the Ninth Circuit, in *Kennedy* v. *Newspaper Guild, supra,* held that charging parties lacked standing to seek a stay of a district court's dissolution of a Section 10(l) injunction, or to intervene in the Board's efforts to secure such a stay, the Fifth Circuit held to the contrary in *Houston Insulation, supra.* The decision in *Kennedy* was subsequently vacated by the Supreme Court.

In *Henderson* v. *International Union of Operating Engineers, Local 701,* 420 F. 2d 802 (CA 2, 1969), the Ninth Circuit concluded that the successful charging party in a 10(l) proceeding lacked standing to constitute an "appellee" in the court of appeals and was relegated to the status of *amicus curiae.* However, the court's analysis of Section 10(l) appears to be inconsistent with its conclusion. At footnote 2 of its decision, the court stated:

> "Under [Section 10(l)], *any* person involved in the charge is entitled to appear in the district court by

> counsel and to present relevant testimony. If the order entered by the district court aggrieves any such party, it undoubtedly has the right to appeal." (Emphasis added.)

Thus the court appears to hold that while a successful charging party may not intervene in an appeal of that successful result, if he loses in the district court then he may appeal the unsuccessful result himself, a right consistent only with party status. Such a decision is, apart from its logical infirmity, totally inconsistent with this Court's holding in *Scofield, supra.*

And in *San Francisco-Oakland Newspaper Guild* v. *Kennedy, supra,* cert. den. 393 U. S. 926, the Ninth Circuit similarly held that a successful charging party could not intervene in the appellate review of a Section 10(l) proceeding. That decision, too, appears to be in conflict with *Scofield,* with the Second Circuit's decision in *McLeod* v. *General Electric Co., supra,* and with various district courts which have found the right to intervene to be part of the scheme of 10(l). See *David* v. *Hotel and Restaurant and Bartenders International Union, et al.* (D. C. Okla., No. 66-68, 1966), (unreported but described in the Thirty-first Annual Report of the N. L. R. B., at 155-6); and *Penello* v. *Plumbers Local Union No. 5,* 41 LRRM 2269 (D. C. Va. 1957):

> "Section 10(1) of the Act plainly authorizes participation by the charging party. Intervention is necessary to implement this right." (Citations omitted.)

The principal judicial authority in the interpretation of Section 10(l) is an earlier Ninth Circuit decision, *Retail Clerks Union, Local 137* v. *Food Employers Council, Inc., supra.* The preeminence of this decision derives not only from the fact that its analysis is so much more thoughtful and detailed than that of any other decision on the subject,

but also from the fact that its merits were specifically approved by the Supreme Court in *Scofield*.[30]

The question before the Court in *Retail Clerks*, as it is here, concerned the extent and the nature of the rights possessed by charging parties pursuant to Section 10(l) in the district court proceedings to which their charges gave rise.

In *Retail Clerks*, pursuant to an appropriate charge filed with him and his investigation thereof, a Regional Director filed a petition in a district court for a temporary injunction under Section 10(l) to prevent a union from enforcing an alleged "hot cargo" agreement. Thereafter, instead of pursuing his pending petition for injunctive relief, the Regional Director executed a Stipulation with the offending union according to which the latter would cease its alleged unlawful conduct. The Regional Director filed this Stipulation in the district court and sought its approval by that court in lieu of injunctive relief. The charging parties, however, opposed the approval of the Stipulation and urged the court to grant injunctive relief pursuant to the Regional Director's pending petition and over the Regional Director's objections. The district court, cognizant that the charging parties' vital interests were involved and that the statute was enacted in order to provide protection to just such interests of such parties, recognized their right to an effective hearing on their objections to the Stipulation. After hearing the evidence, the court granted the injunction as the charging parties requested and over the objection of the Regional Director. The union and the Regional Director then appealed from the order granting the injunction.

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30. While its subsequent decisions have not uniformly applied the logic of *Retail Clerks*, neither has the Ninth Circuit ever rejected or modified or reflected any doubt as to the merits of the teaching of that case.

In his appeal, the Regional Director contended, *inter alia*, that the private charging parties lacked standing either to urge the granting of injunctive relief under Section 10(l) or to oppose the Regional Director's modified request for relief in the district court.

With respect to the Regional Director's first contention, the Court held that while only the Regional Director may *initiate* suits for injunctive relief pursuant to the mandatory duty imposed upon him by Section 10(l), whenever he has reasonable cause to believe that one of the sections enumerated therein has been violated, that once he has done so, no statutory provisions or policy inhibits the charging parties' *right* to urge the granting of injunctive relief. So long as the urging of the charging parties is consistent with the facts, theories and relief sought in the petition, they may actively *support* it despite any subsequent attempted change of position by the Regional Director. The distinction between "initiate" and "support" was found to be critical. Accordingly, the Ninth Circuit held that district courts may grant injunctions at the urging of charging parties and over the objection of the Regional Director, in cases under Section 10(l):

> ". . . where the charging parties did not petition the court independently or for relief different than that sought by the Regional Director, *but merely supported the original petition for injunctive relief requested by the Regional Director.*" (Emphasis added.)

The Regional Director's second appellate contention, in which he attacked the charging parties' standing to object to his decision to seek a lesser remedy than an injunction despite the pendency of his petition, was found to be equally non-meritorious. The Ninth Circuit expressly held the language of Section 10(l), in which charging parties are guaranteed the right to notice, to participation by counsel, and to an equal role in the development of rele-

vant evidence in district courts, as sufficient to confer such standing. Moreover, the court reached the same conclusion less directly when it stated that district courts should grant appropriate relief in injunction suits under Section 10(l), whether or not the Regional Director persists in seeking such relief after he files his petition. However, if the Regional Director does not seek the injunction, the district court cannot grant it *sua sponte*. It follows, therefore, that once the Board's petition is on file, charging parties must have standing to urge such relief *independently* of the Regional Director if the district court is to have an option to grant it in the event of the Regional Director's change of position.

In summary, the Ninth Circuit's decision in *Retail Clerks* constitutes persuasive precedent for the propositions that charging parties in cases under 10(l) have the right to be heard in the district court to urge the granting of injunctive relief, in support of and pursuant to the Regional Director's pending petition, whether or not the Regional Director continues to seek such relief. Similarly, they have standing to object and to meaningful hearing on their objections to his refusal to persist in his efforts to secure such relief or to his decision to seek lesser relief. The right to make and be heard on these objections necessarily implies that the charging parties are entitled to the holding of a hearing on those objections despite the Regional Director's desire to dispense with such a hearing and to accept other and lesser than injunctive relief. And the combination of these rights should be understood to confer on charging parties the right to participate as full party-litigants in proceedings under Section 10(l), either directly or through intervention; those are the rights which are

commonly exercised only by "parties", and there are no further or greater rights which could meaningfully be exercised within the statutory scheme of the Act.[31]

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31. While the entire thrust of the Court's decision in *Retail Clerks* is that charging parties, under Section 10(1), possess the rights of and function as "parties"—particularly the Court's suggestion that their status under Section 10(1) is analogous to their status before the Board itself where they exercise precisely the same rights and are recognized as "parties"—nonetheless the Court did not permit them to intervene but relegated them to the status of *amici*. This result does seem inconsistent with all the discussion and analysis which preceded it. It may well be that the Court, having determined to approve the granting of relief requested by the charging parties, chose not to decide the tangential and unnecessary question of legal status which had, in any event, not been litigated in those terms.

In any event, the *Retail Clerks* case was decided before *Scofield*, one of whose points was precisely that charging parties are entitled to exercise a greater role than that of *amici curiae* in the judicial consideration of their vital interests; it was also decided *before Association of Data Processing, Barlow* v. *Collins*, and *Arnold Tours* v. *Camp, supra*. Given the inherent logic of *Retail Clerks*, it seems fair to conclude that had the Court had the benefit of these authorities at the time it rendered its decision, it would, at least, have granted intervention by the charging parties. Indeed, it is submitted that the Court would have been compelled to do so.

Conclusion.

For the foregoing reasons, it is respectfully urged that this petition for writ of certiorari should be granted.

Respectfully submitted,

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